

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KABELO EDWIN SELEMOGO,

Defendant-Appellant.

UNPUBLISHED

April 3, 2008

No. 273410

Mecosta Circuit Court

LC No. 05-005495-FH

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant appeals by right from his convictions of first degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and of HIV-positive sexual penetration with an uninformed partner, MCL 333.5210. The trial court sentenced defendant to 108 to 240 months' imprisonment on the CSC I conviction and to a concurrent 9-month term on the uninformed sexual penetration conviction. We affirm defendant's convictions and sentences, but vacate the portion of defendant's sentence requiring him to pay attorneys' fees. We remand to the trial court for a determination of defendant's current and future ability to pay the fees, consistent with this Court's holding in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004).

Defendant, a native of Botswana, was a student at Ferris State University. His convictions arose out of a brief relationship he had with the victim in 2005. After one date with the victim, defendant arrived at her house asking for sexual intercourse. The victim told defendant she would not have intercourse with him, but allowed him to come to her bedroom to talk. The victim dozed off, and when she awoke defendant had pinned her down with his body. He penetrated her vaginally and ejaculated. After his arrest, defendant acknowledged that he had been diagnosed with HIV in 2003.

Defendant's first argument on appeal is that the trial court failed to ensure that his waiver of a jury trial was knowing and voluntary. Defendant did not present this issue to the trial court, therefore, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

As defendant correctly asserts, the constitutional right to a jury trial is an integral aspect of our criminal justice system. To accept a waiver of this fundamental right, the trial court must ensure that the defendant understands the right and is voluntarily relinquishing it. MCR

6.402(B). Here, defendant maintains that the trial court's reference to waiver by the prosecutor and the court were confusing, and that given defendant's limited experience with the English language, the trial court's advisement concerning the jury trial waiver was ineffective. We disagree.

The trial court specifically asked defendant whether he wished to give up his right to have his case tried by a jury. Defendant was definitive in his response, both orally and in the signed version of the waiver. Moreover, the trial court reconfirmed defendant's intent and desire to waive a jury trial before convening the trial. Defendant never, throughout the course of the proceedings, asserted that he lacked the ability to speak or understand English. To the contrary, his counsel stated that defendant had no difficulty whatsoever understanding the proceedings. Accordingly, his challenge to the jury trial waiver fails. See *People v Atsilis*, 60 Mich App 738, 738-740; 231 NW2d 534 (1975).

Defendant next argues that the trial court committed a sentencing error, by assessing 15 points against defendant for offense variable (OV) 2. Defendant presented this challenge in post-trial motion to correct errors and challenging the effectiveness of trial counsel, thereby preserving both the scoring issue and his related claim of ineffective assistance of counsel. MCL 769.34(10); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

OV 2 requires the assessment of 15 points when "[t]he offender possessed or used a harmful biological substance." MCL 777.32(1)(a). Defendant contends that OV 2 cannot apply to his situation, because he cannot be deemed to have "possessed or used" a harmful biological substance within the meaning of OV 2. Further, he claims that his counsel was ineffective for failing to object to the OV 2 scoring at sentencing. Because this sentencing issue requires interpretation of the OV 2 statute, we review the issue de novo. *People v Derror*, 475 Mich 316, 324; 715 NW2d 822 (2006).

In *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007), this Court held that the act of spitting HIV-infected blood at a victim requires assessment of points under OV 1, because the victim was exposed to a harmful biological substance. *Id.* at 410, 413. Here, as in *Odom*, the victim was exposed to a harmful biological substance, i.e., HIV-infected semen. Although OV 2 requires that defendant possess or use the harmful substance, the common definition of possession plainly includes control over bodily fluids. Black's Law Dictionary (8th ed) defines "possess" to mean "to have in one's actual control; to have possession of." Defendant does not argue that he lacked control over his HIV-infected semen. Given that his semen was a harmful substance, and that the semen was under his exclusive control at the time of the crime, the trial court correctly assessed 15 points against defendant under OV 2. Accordingly, we reject defendant's interpretation of the statute, that an HIV-positive man does not possess or use his semen unless he carries the semen in a vial with the intent to use it as a weapon, as unduly narrow. We also reject defendant's contention that his counsel was ineffective for failing to raise the instant sentencing challenge. Counsel was not required to interpose a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant's last argument is that the trial court erred by assessing attorney fees against him without placing on the record any information concerning defendant's ability to pay those fees. As plaintiff concedes, this Court's decision in *Dunbar* requires that trial courts consider offenders' ability to pay attorney fees. Here, there is nothing in the record to demonstrate that

the trial court considered defendant's ability to pay. Accordingly, we vacate the attorney fee assessment and remand to the trial court for a determination of defendant's current and future ability to pay the assessment, consistent with our instructions in *Dunbar*.¹

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter

¹ Although our Supreme Court, in *People v Carter*, 430 Mich 938; 741 NW2d 23 (2007), had requested the parties brief the issue, "whether the constitutional underpinnings of *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004) are sound," the Supreme Court ultimately denied leave to appeal. *People v Carter*, 480 Mich 1063; 743 NW2d 918 (2008).